Supreme Court, U.S.
FILED

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No.____

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

BURTON W. ONSTINE,

Petitioner,

v.

JUDITH A. RAMALEY, et al., individually and in their official capacities as employees of Portland State University

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTION PRESENTED

Whether the Fourteenth Amendment guarantees some form of due process to a tenured university professor, prior to, or at least after, his removal from his teaching duties and forfeiture of his pay and benefits.

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OPINIONS BELOW

The unpublished memorandum opinion, and dissent, are reproduced as Appendix (App.) A. The order denying the petition for rehearing is reproduced as Appendix B. The district court's opinion is unpublished.

JURISDICTION

The court of appeals entered its judgment on August 20, 1998. The court's order denying a rehearing was entered on September 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life Liberty, or property, without due process of law." U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

It is somewhat unconventional to quote, verbatim, a dissenting opinion as the statement of the case. However, Professor Onstine could not devise a more succinct and accurate statement of the case than that of the dissent by Judge Ferguson. Thus, this Court's indulgence is requested. The proceedings below are contained in a brief paragraph at the conclusion of this section.

For thirty years, Professor Onstine taught at Portland State University and was in the words of his employer, a "valuable member" of the community. On March 7, 1995, he appeared at work disoriented and acting strangely. Based solely on this single incident, the university made the professor's position and salary contingent upon a mandatory psychiatric evaluation. The university couched this requirement in terms of the safety of students, the professor, and that of the general public.

However, there is no evidence to demonstrate that the professor posed any type of threat to anyone. In fact, on the day of the incident, university psychiatrists concluded that he was not dangerous to himself or others.

Without any process at all, the professor ends up on permanent unpaid sick leave. He has lost his salary, benefits, and the opportunity to continue work, all, it is worth repeating, without any process at all.

The majority excuses all this because of the existence of a collective bargaining agreement between the university and its employees. The agreement provides that it applies only when the aggrieved professor first files a grievance with the appropriate dean. Because Professor Onstine did not do that, the majority concludes that he has no right to a due process hearing. The majority cites Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992) for the proposition that a public employer may meet its due process obligations through general procedures established in a collective bargaining agreement. That case has no bearing here because in Armstrong, the only remedy that employees had was a collective bargaining agreement. Here the professor has a remedy under state law. Armstrong itself noted this distinction. It stated that in a case involving only a collective bargaining agreement, cases involving due process under state law are not applicable. The State of Oregon has detailed administrative rules, specifically for Portland State University, which are mandated by Oregon legislation. See Oregon Revised Statutes Chapter 351.

Section 577-41-010 of the Rules provides that professors may be sanctioned only for cause. The only grounds for cause stated in the rules which could possibly apply to Professor Onstine is a refusal to leave the university premises when ordered to do so because of posing a threat to personal safety, property, or activities on the premises. However, no one claims that the professor ever refused to leave when ordered to do so. In fact, no such order was ever made.

Section 577-41-015 requires that complaints which may warrant the imposition of sanctions must be filed in writing with the president of the university or his deputy. The complaint must be in writing and state specific facts which constitute grounds for the imposition of sanctions. The professor must be sent a copy of the complaint. The university must explore the possibility of a mutually acceptable resolution. If there is none, then the rules provide for a formal hearing.

Nothing mandated by state law was done in this case. No one can seriously contend that permanent sick leave without pay is not a sanction. Sanctions are defined at ADC 577-41-010(3) as follows: "Sanctions for cause include oral or written warning or reprimand, written censure, removal from an assigned post and reassignment, suspension for a period not to exceed one year, and termination." If an oral warning is a sanction, then certainly permanent unpaid sick leave is a sanction. The code then proceeds to mandate in detail the proceedings which must be held, none of which were conducted by the university. If the president finds that the continued performance of the professor poses a clear and present danger to the university, professor or

public, he may suspend the professor, without financial penalty, from some or all his duties. Only after a formal hearing process, including findings of fact and conclusions of law, can what was done to Professor Onstine be accomplished.

The majority concedes that the professor had a property interest in his job under Oregon law and that this property was taken away from him. The majority, however, decree that Professor Onstine was deprived of that interest by due process of law because he did not provide the university with a requested medical evaluation nor ask for a grievance proceeding under the collective bargaining agreement. However, the law of Oregon does not require Professor Onstine to do either. Oregon Law places the burden upon the university to establish the due process requirements. The professor need not do anything until the due process proceedings are in place.

Of course, the university and Professor Onstine could have agreed that the due process requirements of Oregon Law were waived and the parties could proceed under the collective bargaining agreement. However, that was never done, and the record is void of any suggestion that the matter was even considered by anyone.

Professor Onstine was deprived of his livelihood after thirty years of being a valued member of the academic community. The defendants denied the most fundamental basis of all law -- due process, which is equated with justice. The due process requirements that must be accorded college professors in Oregon are not insurmountable. All that must be done is to obey the law. I therefore dissent.

Proceedings Below

Professor Onstine's First Amended Complain was filed on November 11, 1996, in federal district court in Portland, Oregon. His complaint alleged violations of his civil rights under 42 U.S.C. § 1983, violations of his Fourteenth Amendment due process rights and violations of Oregon law.

The district court granted summary judgment dismissing Onstine's complaint in an unpublished opinion. Onstine appealed on June 6, 1997. On August 20, 1998, the Ninth Circuit filed its Memorandum opinion, affirming the district court, Judge Ferguson, dissenting. (App. A). On August 31, 1998, Onstine filed his Petition for Rehearing, based upon mistake of fact. On September 25, 1998, the Ninth Circuit denied the Petition. (App. B)

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has effectively rewritten Onstine's American Association of University Professors Collective Bargaining Agreement ("CBA"). In the vast Ninth Circuit, in virtually every AAUP contract (and, quite possibly, every single collective bargaining agreement in every profession) the grievance procedure is now the sole remedy for virtually every adverse situation facing a tenured employee, even though the adverse situation is unique, not covered by the collective bargaining agreement, or, as in this particular case, expressly excluded from the agreement, as shown below.

The Ninth Circuit's memorandum ignored the Fourteenth Amendment's Due Process Clause. It interpreted Oregon's Administrative Rules, governing due process procedures applied to ALL tenured employees, to exclude a situation in which administrators use the label "permanent sick leave without pay" to take away a tenured employee's work and pay. Virtually every State has similar administrative rules which require due process to take away one's livelihood. Now, those States no longer need follow their own State laws nor need the be bound by the due process clause of the Fourteenth Amendment.

The Decision of the Court of Appeals is Erroneous

Oregon's Attorney General adopted the litigation strategy of branding Onstine a psychotic trouble maker, This strategy must have worked because the district court granted the AG summary judgment upon a made up rationale The district court's opinion even acknowledged that there was no statutory nor common law authority to deny Onstine his work and pay, and ignored the Collective Bargaining Agreement -- but declined to give Onstine his job back. The Ninth Circuit majority, correctly, ignored the district court's opinion.

However, the majority concluded: "Because Onstine had the ability to seek redress through the CBA grievance procedures ... we find that Onstine was provided with all of the process due him under the Fourteenth Amendment, and we therefore affirm the lower court's grant of summary judgment for the defendants." (App. A p. 9)

Under a plain reading of the Collective Bargaining Agreement's grievance procedure, it was, is, and forever will be, unavailable because the grievance must result from the employer admitting that the employee must be "sanctioned." Respondents always insisted that removal of Onstine from his work and stopping his pay were not "sanctions." Thus, Onstine's grievance procedure referring to a right to grieve "sanctions" could not apply. And, now all administrators now have the perfect strategy, i.e., refuse to call whatever event they impose upon the hapless employee, a "non-sanction."

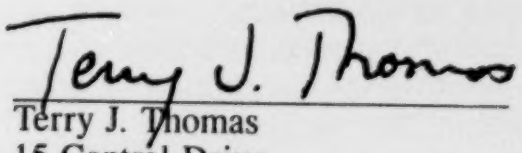
In Onstine's case, the CBA expressly excludes questions of a professor's "competence" from the grievance procedure. Since the majority concluded there have been no sanctions and the CBA expressly excludes questions of Onstine's competence, the majority's reliance on the CBA as providing "all the process that is due" to Onstine is erroneous.

CONCLUSION

This Court has held, numerous times, that the Fourteenth Amendment's due process clause guarantees some form of process, although due process "...unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and call for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S., 924, 930, 117 S.Ct 1807, at 1812, 138 L.Ed.2d 120 (1997)

No process cannot, ever, comply with any form of the Fourteenth Amendment's due process requirement. Review of the decision below can assure tenured employees have "such procedural protections as the particular situation demands."

Dated: December 22, 1998 Respectfully submitted



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APPENDIX A

A-1

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Cathy A. Catterson
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BURTON W. ONSTINE, Plaintiff-Appellant, vs. PORTLAND STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY; MICHAEL REARDON; RODERIC DIMAN; MARVIN KAISER; GARY L. SCOTT; MARY BETH COLLINS; CONRAD SEIBER, Defendants-Appellees.	)	No. 97-35639 D.C. No. CV-96-00460-DCA MEMORANDUM[1]

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Oregon
Donald C. Ashmanskas, Magistrate Judge, Presiding

Argued and submitted July 9, 1998
Portland, Oregon

Before: ALARCON, FERGUSON, and BRUNETTI, Circuit Judges.

Appellant Burton W. Onstine, a tenured assistant professor of political science at Portland State University, appeals the district court's grant of summary judgment for the defendants, officials of the University, in his 42 U.S.C. § 1983 suit alleging violation of his procedural due process rights. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

The facts in the case are for the most part undisputed, and are as follows. On March 6, 1995, Onstine called in sick to the University for the following day, March 7, 1995, on which he was scheduled to teach. On March 7, 1995, Onstine showed up at the University exhibiting strange behavior. Witnesses claimed that he was talking like a duck, stalking furniture, clapping his hands in a dark room, dancing and singing down the hallway, talking about "going with the flow," making "whoosh" sounds, and engaging in conversations that did not make sense. Onstine did not attend his scheduled morning class.

In response to Onstine's behavior, defendant Scott, who was Onstine's immediate superior, contacted University security personnel who then contacted Dr. Conrad Seiber, a University psychologist. After consulting with Dr. Seiber and

another counselor, Onstine refused their suggestion to go to the hospital, but agreed to take a taxicab home. Onstine has not since returned to teach at the University.

Defendants Scott and Diman prepared a letter to Onstine, signed by Scott, and sent on March 10 and again on March 17, 1995, which read, in pertinent part:

> Your return to full-time responsibilities will be contingent upon providing me with a written evaluation of your condition made by a competent mental health professional. If this cannot be done by the beginning of classes for Spring term, i.e., by March 27, 1995, I will place you on sick leave.

On March 23, 1995, in response to Scott's letter, Onstine wrote to Scott:

> Thank you for your thoughtful letters of March 10, 1995 and March 17, 1995 received March 23, 1995.
>
> I deeply appreciate your concern for my welfare.
>
> I accept with alacrity your kind offer to place me on sick leave for Spring Term, 1995.

After receiving Onstine's letter, Scott did not have any further contact with Onstine until May 25, 1995, when he wrote Onstine regarding the 1995-96 academic year. Again Scott stated that before Onstine could return to teaching, he would be required to provide a written evaluation of his

mental condition. Scott requested that such an evaluation be submitted by August 1, 1995.

On August 8, 1995, having failed to receive an evaluation of Onstine's condition, Diman wrote Onstine a letter which read, in pertinent part:

> During the Sprint term 1995 you were placed on sick leave. The requirement was made that you provide an evaluation from a competent mental health professional as to your mental condition and the appropriateness of your returning to your full-time responsibilities for the fall quarter, 1995.
>
> I understand that you have not provided this documentation, and I must reiterate that it is necessary before you will be allowed to return to your duties.

Onstine responded by writing a letter to Scott proposing that Onstine "take a sabbatical at full pay for the Fall Term 1995 and another sabbatical Winter Term 1996 at full pay." Onstine further suggested that he would "be looking forward to a greatly reduced teaching load Spring Term 1996." Scott replied by letter dated August 21, 1995 that he could not discuss the possibility of sabbaticals or a reduced teach load until he received the written evaluation of Onstine's ability to return to work. Scott also noted that he assumed from Onstine's previous letter that Onstine would not be returning to teach during the Fall Term, and that Scott would therefore continue Onstine's sick leave.

On September 20, 1995, Diman sent Onstine a letter, stating as follows:

> The chair of your department has informed me that he has received no answer to his letter requesting that you provide him with a written evaluation of your ability to return to classroom duties.
>
> This is to inform you that, since we had not received the documentation of your ability to perform your responsibilities, effective September 16, 1995, you were again placed on sick leave, that we have designated your leave as Family Medical Leave, and that according to records in the Payroll Office, your accrued sick leave will run out December 8, 1995. If we do not hear from you, beginning December 9, 1995 through June 15, 1996 you will be placed on leave without pay. If by June 15, 1996 you have not contacted the University and provided the requested evaluation, we will proceed to terminate your employment.
>
> Please contact me to discuss this matter. You have been a valuable member of our community, and we want to help you any way that we can.

In November 1995, Onstine requested and received a psychiatric evaluation from Dr. David B. Jarvis. On November 18, 1995, Dr. Jarvis stated, in a letter addressed "To Whom it may concern," that he found "no medical/psychiatric reasons that would prevent [Onstine] from returning to full academic duties at this time." Onstine, however, never forwarded this letter to the University.

On December 1, 1995, Diman wrote Onstine a letter reminding him that he was about to exhaust his paid sick leave, and would be placed on leave without pay beginning

December 9, 1995. Diman also expressed his concern about Onstine's failure to get in touch with anyone at the University. On December 9, 1995, Onstine was placed on sick leave without pay, and he has remained on that status to the present date.

Onstine filed the present suit alleging under § 1983 that the defendants violated his Fourteenth Amendment procedural due process rights when they placed him on unpaid sick leave, in violation of the Oregon Administration Rules (OARs). The court below granted defendants' motion for summary judgment, and Onstine now appeals.

II.

The Fourteenth Amendment protects against the deprivation of property of liberty without procedural due process. Brady v. Gebbie, 859 F.2d 1543, 1547 (9th Cir. 1988). There is no dispute here that Onstine, as a tenured professor at Portland State University, had a property interest in his job under Oregon law. See Id. at 1549 (citing Papadopoulos v. Oregon State Bd. Of Higher Educ., 511 P.2d 854 (1973)). Thus, the only issue is whether he was deprived of this interest without due process of law.

"It is by now well-established that due process, unlike some legal rules, is not technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands." Higgins v. Port of Newport, 121 F.3d 1281, 1283 (9th Cir. 1997) (internal quotation marks and citations omitted). To determine what process is constitutionally due, we must consider three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the

government's interest. Id. (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

III.

Onstine argues that the defendants deprived him of his property right in his job without due process when they placed him on unpaid sick leave on December 9, 1995, after Onstine failed to provide a medical evaluation of his mental fitness to return to duty. We find, however, that Onstine was provided all of the process due him under the Fourteenth Amendment.

In Armstrong v. Meyers, 964 F.2d 948, 950 (9th Cir. 1992), we held that "[a] public employer may meet is obligation to provide due process through grievance procedures established in a collective bargaining agreement, provided, of course, those procedures satisfy due process." Here, Articles 19 and 20 of Onstine's collective bargaining agreement (CBA), as well as OARs 577-42-005 through 577-42-025 and 580-21-050, provide for detailed, multi-level grievance and arbitration proceedings. Under the CBA formal grievance procedures, at the first step, a grievance is presented to the appropriate dean, who meets with the grievant, and then issues a written decision. If the grievant is unsatisfied with the result at step one, at step two a request for review may be filed with the Vice President, who meets with the grievant then issues a written decision. If the grievant is still not satisfied, at step three he may file a request for review with the President, who meets with the grievant and issues a written decision. Finally, at step four, a request for review may be filed with the Chancellor, who meets with the grievant and issues a decision in writing. Alternatively, at step four the grievant may give written notice to the President of intent to proceed to arbitration. If the grievant so chooses, a hearing is held before an arbitrator, who must issue a decision in writing, setting forth findings of fact, reasoning, and conclusions.

At the time Onstine received the University's letter of September 20, 1995, informing him that he would be placed on leave without pay beginning December 9, 1995, Onstine could have responded by either providing the University with the requested medical evaluation, or by invoking the above-cited University grievance procedures. It is undisputed that he did neither.

Because Onstine had the ability to seek redress through the CBA grievance procedures, which clearly satisfy due process under Armstrong, we find that Onstine was provided with all of the process due him under the Fourteenth Amendment, and we therefore affirm the lower court's grant of summary judgment for the defendants.

IV.

We note that our decision does not rest upon the parties' compliance, or lack thereof, with the OARs, as we find that none of the cited provisions apply in this situation.

Onstine cites OARS 577-580, which require, in pertinent part, that a written complaint be filed prior to the imposition of disciplinary sanctions on a professor, and that written findings be made regarding the danger presented by a professor prior to any suspension, which must be with pay. Defendants respond by citing OAR 580-21-040, which provides that the University may request a physician's certificate to support a sick leave claim under specified circumstances.

As to the OARs cited by Onstine, we agree with the lower court that the actions taken by defendants did not amount to a "sanction" implicating the procedures outlined therein. With respect to the defendants, we find that their reliance upon the OARs is misplaced, as the rules they cite deal with the situation in which a professor requests sick leave, as opposed to the situation where a professor is put on sick leave by the

University, as was the case here.

V.

Because Onstine has not prevailed on appeal, his request for attorneys' fees on appeal is denied. See 42 U.S.C. § 1988(b).

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Aug 20 1998
Cathy A. Catterson
U.S. Court of Appeals

Onstine v. Ramaley, et al., No. 97-35639

FERGUSON, Circuit Judge, dissenting.

For thirty years, Professor Onstine taught at Portland State University and was in the words of his employer, a "valuable member" of the community. On March 7, 1995, he appeared at work disoriented and acting strangely. Based solely on this single incident, the university made the professor's position and salary contingent upon a mandatory psychiatric evaluation. The university couched this requirement in terms of the safety of the students, the professor, and that of the general public. However, there is no evidence to demonstrate that the professor posed any type of threat to anyone. In fact, on the day of the incident, university psychiatrists concluded that he was not dangerous to himself or others.

Without any process at all, the professor ends up on permanent unpaid sick leave. He has lost his salary, benefits, and the opportunity to continue work, all, it is worth repeating, without any process at all.

The majority excuses all this because of the existence of a collective bargaining agreement between the university and its employees. The agreement provides that it applies only when the aggrieved professor first files a grievance with the appropriate dean. Because Professor Onstine did not do that, the majority concludes that he has no right to a due process hearing. The majority cites Armstrong v. Meyers, 964 F.2d 948 (9th Cir. 1992) for the proposition that a public employer may meet its due process obligations through general

procedures established in a collective bargaining agreement. That case has no bearing here because in Armstrong, the only remedy that employees had was a collective bargaining agreement. Here the professor has a remedy under state law. Armstrong itself noted this distinction. It stated that in a case involving only a collective bargaining agreement, cases involving due process under state law are not applicable. The State of Oregon has detailed administrative rules, specifically for Portland State University, which are mandated by Oregon legislation. See Oregon Revised Statutes Chapter 351.

Section 577-41-010 of the Rules provides that professors may be sanctioned only for cause. The only grounds for cause stated in the rules which could possibly apply to Professor Onstine is a refusal to leave the university premises when ordered to do so because of posing a threat to personal safety, property, or activities on the premises. However, no one claims that the professor ever refused to leave when ordered to do so. In fact, no such order was ever made.

Section 577-41-015 requires that complaints which may warrant the imposition of sanctions must be filed in writing with the president of the university or his deputy. The complaint must be in writing and state specific facts which constitute grounds for the imposition of sanctions. The professor must be sent a copy of the complaint. The university must explore the possibility of a mutually acceptable resolution. If there is non, then the rules provide for a formal hearing.

Nothing mandated by state law was done in this case. No one can seriously contend that permanent sick leave without pay is not a sanction. Sanctions are defined at ADC 577-41-010(3) as follows: "Sanctions for cause include oral or written warning or reprimand, written censure, removal from an assigned post and reassignment, suspension for a period not to

exceed one year, and termination." If an oral warning is a sanction, then certainly permanent unpaid sick leave is a sanction. The code then proceeds to mandate in detail the proceedings which must be held, non of which were conducted by the university. If the president finds that the continued performance of the professor poses a clear and present danger to the university, professor or public, he may suspend the professor, without financial penalty, from some or all his duties. Only after a formal hearing process, including findings of fact and conclusions of law, can what was done to Professor Onstine be accomplished.

The majority concedes that the professor had a property interest in his job under Oregon law and that this property interest was taken away from him. The majority, however, decree that Professor Onstine was deprived of that interest by due process of law because he did not provide the university with a requested medical evaluation nor ask for a grievance proceeding under the collective bargaining agreement. However, the law of Oregon does not require Professor Onstine to do either. Oregon law places the burden upon the university to establish the due process requirements. The professor need not do anything until the due process proceedings are in place,

Of course, the university and Professor Onstine could have agreed that the due process requirements or Oregon Law were waived and the parties could proceed under the collective bargaining agreement. However, that was never done, and the record is void of any suggestion that the matter was even considered by anyone.

Professor Onstine was deprived of his livelihood after thirty years of being a valued member of the academic community. The defendants denied him the most fundamental basis of all law--due process, which is equated with justice.

The due process requirements that must be accorded college professors in Oregon are not insurmountable. All that must be done is to obey the law. I therefore dissent.

APPENDIX B

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U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

	) No. 97-35639
BURTON W. ONSTINE,	)
Plaintiff-Appellant,	)
vs.	) ORDER
	)
PORTLAND STATE UNIVERSITY; OREGON STATE BOARD OF HIGHER EDUCATION; JUDITH A. RAMALEY; MICHAEL REARDON; RODERIC DIMAN; MARVIN KAISER; GARY L. SCOTT; MARY BETH COLLINS; CONRAD SEIBER,	)
Defendants-Appellees.	)
	)

Before: ALARCON, FERGUSON, and BRUNETTI, Circuit Judges.

Judge Alarcon and Judge Brunetti have voted to deny appellant's petition for rehearing. Judge Ferguson has voted to grant the petition for rehearing. Appellant's petition for rehearing is DENIED.